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In The

# Supreme Court of the United States

October Term, 1994

IVRIN BOLDEN, JR.,

*Petitioner,*

v.

THE STATE OF LOUISIANA,

*Respondent.*

On Petition For A Writ Of Certiorari
To The Supreme Court Of Louisiana

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

I. Is it a violation of the collateral estoppel component of the Double Jeopardy Clause to subject a citizen to a perjury prosecution for denial of a murder after acquittal of the substantive charge when said citizen, subsequent to the acquittal, actually confesses to the murder he denied while under oath during the previous trial?

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No. 93-1245

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October Term, 1994

IVRIN BOLDEN, JR.,

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*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The State of Louisiana, Respondent, respectfully prays that a writ of certiorari to review the judgment and opinion of the Supreme Court of Louisiana in this case. be denied.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

LSA-R.S. 14:123 states:

Perjury is the intentional making of a false written or oral statement in, or for use, in, a judicial proceeding, or any proceeding before a board or official, wherein such board or official is authorized to take testimony. In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation, and must relate to a matter material to the issue or question in controversy.

It is a necessary element of the offense that the accused knew the statement to be false; but an unqualified statement of that which one does not know or definitely believe to be true is equivalent to a statement of that which he knows to be false.

## STATEMENT OF THE CASE

The defendant, Ivrin Bolden, Jr., was indicted, by a Ouachita Parish Grand Jury, for the murder of Brenda Spicer. He was tried during the month of March 1988. He was acquitted for the charge of murder.

During the course of the trial, Bolden testified as follows:

Q. Did you meet Brenda Spicer at the storage locker on March 5th?

A. No, I did not at any time that day.

Q. The only time you saw Brenda Spicer is when she gave you that camera and the $5.00?

A. I saw her earlier in the dorm and the last time I saw her was at the intersection when she gave me the camera.

Q. Did you have any kind of physical struggle or contact with Brenda Spicer that day?

A. No, I didn't have any contact with her at all physically.

Q. Did you have any kind of sexual intercourse with Brenda Spicer?

A. Never did.

Q. You never have?

A. No, I haven't.

Q. Did you kill Brenda Spicer on March 5th?

A. No, I did not.

In April 1991, Bolden was interviewed by authorities of the Burlington County Prosecutor's Office, New Jersey Homicide Unit and by Sergeant Tim Cook of the Memphis, Tennessee Police Department. Bolden was suspected of the murder of his former girlfriend, Joel Tillis. Tillis' body was located in the State of Arkansas. She had lived in Tennessee. The authorities were not certain in which jurisdiction she was killed.

The interview was primarily conducted in regard to the death of Joel Tillis; however, the Spicer murder was discussed as follows:

Q. Other than Joel Tillis, who is the other girl that you killed?

A. Brenda Spicer.

Q. And what were the circumstances surrounding the death of Brenda Spicer?

A. I don't know, she, she made me mad too, I guess. I was, I always wanted to be with whatever girl I am, I always wanted to be, have some attention with them, and just be with them without somebody else, I guess getting some of her attention. Joel seemed to always give her a lot of attention and, with, you know, with me around, and I didn't like that. I tried to, you know, talk to her, talk to Joel about it, and you know, ask her about it, but she kept on.

Q. What were the circumstances surrounding the death of Ms. Spicer?

A. I went, um, I asked her to come to like, we had a storage unit, and I asked her to come there with me and then I was trying to talk to her, you know, I had been asking her and asking her to, you know, try to give me some time with Joel and she just, you know, she just kept saying that she was going to be with Joel no matter what, and so I just, I got mad with her and I strangled her.

Q. And where did this take place at, the storage area?

A. Yeah.

Q. And where was the storage located?

A. Not far from the college campus in Monroe, Louisiana.

Q. And after you strangled her, what did you do?

A. Took her body back to the campus and put in the dumpster and went back to, to, went back to the game or I went back to the dorm or something.

Subsequent to the aforementioned statement, the Monroe Police authorities learned that Bolden had confessed. Bolden was extradited from New Jersey to Tennessee. He subsequently pled guilty to manslaughter for the death of Joel Tillis. After the disposition of Bolden's Tennessee charge, and subsequent to a perjury warrant being issued in March 1992, by the Fourth Judicial District Court, extradition papers were prepared for Bolden's return to Ouachita Parish. He waived extradition to Louisiana.

Bolden filed several pre-trial motions, one of which is the instant motion to quash on grounds of collateral estoppel. The motion was denied by the Honorable Michael Ingram, Judge. Bolden applied for a writ to the Court of Appeal Second Circuit, State of Louisiana. Said writ was denied.

An application for supervisory writs was then filed with the Louisiana Supreme Court. On December 20, 1993, said court granted writs and set the matter for oral argument. Oral arguments were had in February, 1994.

On July 5, 1994, the Louisiana Supreme Court affirmed the judgment of the lower courts. *State v. Bolden,*

639 So.2d 721 (La. 1994). The Court held that Petitioner's present prosecution for perjury was not barred.

## REASONS FOR DENYING CERTIORARI

### I. THE DECISION BELOW THAT ALLOWS A PERJURY PROSECUTION AFTER ACQUITTAL OF ONE CHARGE WHEN THE STATE HAS OBTAINED NEW AND ADDITIONAL EVIDENCE THAT WAS NOT PREVIOUSLY AVAILABLE TO IT INDICATING THAT THE DEFENDANT TESTIFIED FALSELY UNDER OATH DURING THE FORMER TRIAL, IS BASED UPON SOUND LEGAL REASONING.

Contrary to Petitioner's assertions, the State of Louisiana is not now seeking to litigate, for a second time, his alleged involvement in the murder of Brenda Spicer. The State is seeking to litigate the issue of whether Petitioner lied under oath during said trial.

The Louisiana Supreme Court, in *State v. Elsby*, 416 So.2d 60 (La. 1982), held that when the State attempts to prove a perjury charge based upon a sworn and an unsworn statement, it is required to present sufficient evidence from which a jury may perhaps infer that the statement given under oath was indeed the false statement. Specifically, the Court held that:

> "the State was required to prove beyond a reasonable doubt that the defendant knowingly made a false statement . . . It [is] not sufficient to show merely that the statement under oath was inconsistent with [the] unsworn statement to police." Id. at 61, 62.

The crux of Petitioner's argument is that a previous jury has determined that he did not kill Brenda Spicer; consequently, regardless of any new evidence beyond that adduced at his previous trial, the State cannot now try him for perjury for having lied at that trial.

The Petitioner cites many cases in support of his argument; however, none of the cited cases involve circumstances analogous to those presented by the instant case. None of the cases deal with the proposition of a defendant who is tried for one crime, testifies at trial that he did not commit the crime, is acquitted, and then subsequently admits that he did indeed commit the crime for which he was acquitted.

*Briddle v. Illinois,* 450 U.S. 986, 101 S.Ct. 1527, 67 L.Ed.2d 823 (1981) involved a case in which the defendant was charged with speeding in the initial trial. Immediately after trial and based upon no evidence other than the initial evidence presented at the first trial and the defendant's testimony, he was tried for perjury and obstruction of justice.

In *Sealfon v. U.S.,* 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948) the Court addressed the issue of whether an acquittal of conspiracy to defraud the government could preclude a subsequent prosecution for the substantive offense.

*Turner v. Arkansas,* 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972) involved a case in which the defendant was tried for murder and acquitted. Subsequently, he was charged with robbery arising out of the same facts and circumstances.

*Commonwealth v. Peluso*, 393 A.2d 344 (Pa. 1978), cited by the defendant, contained a note alluding to the fact that additional evidence at a later trial makes no difference for collateral estoppel analysis; however, that case, although involving a collateral estoppel issue, is not on point with the facts of the instant case.

Collateral estoppel is a jurisprudentially created principle. Neither the U.S. Constitution nor the Louisiana Constitution mentions the principle. The Courts, through the years, have created the principle and held that the principle is embodied in the constitutional prohibition against double jeopardy.

The State-herein agrees with the principle. It is a sound principle assuming it is properly applied. The State understands the application of collateral estoppel in situations in which the State attempts to re-try an individual for charges arising out of the same factual basis as the previous trial or in situations in which the State attempts to try an individual for perjury using nothing more than the evidence adduced at the first trial and the defendant's testimony at the first trial.

It is incomprehensible to believe that the State should be precluded from prosecuting a defendant, previously acquitted for murder, for perjuring himself by denying that he committed the murder and then subsequently confessing to the murder.

The State-herein did not attempt to charge Bolden immediately subsequent to his acquittal for murder. It was not until four years later after he confessed to the murder that he previously denied, did the State bring perjury charges.

The State submits that to allow a defendant to lie in one trial that he did not murder a human being, subsequently say that he did indeed commit the murder and then escape trial for perjury, would do violence to our system of criminal justice.

Such a situation would allow a defendant simply because he was a convincing liar and obtains an acquittal, to walk directly out of the courthouse and immediately admit to the murder and escape prosecution for perjury. This would be akin to a grant of absolute immunity. Surely, the principle of collateral estoppel is not so far reaching as to allow one to make a mockery of our criminal justice system.

If this Honorable Court were to adopt the defendant's position, the only person to whom the perjury statute would apply would be those convicted in the previous trial and those who swear under oath, yet are not actually on trial themselves.

The perjury statute is a unique creature unto itself. The statute expressly provides a more severe penalty for perjury committed during a trial of any felony. Does the statute penalize only those persons listed above or does it penalize anyone who lies during the course of said trial?

An oath is administered to everyone who testifies at a trial. That oath must stand for something! The State submits that it stands for the proposition that any person who takes the oath must testify truthfully or be subject to prosecution for perjury. The oath or affirmation itself makes the perjury statute unique. Were it not for said oath or affirmation the provisions of the perjury statute could not be invoked.

This Honorable Court in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) has said that the principle of collateral estoppel should be applied with realism and rationality. Surely, reality does not dictate that it would be rational to believe that a person who denies that he committed a murder, and then subsequent to acquittal admits that he did indeed commit the murder, should be allowed to escape prosecution for perjury.

Further, if collateral estoppel can be applied to prohibit a perjury prosecution under those circumstances, one must question if application of the perjury provisions, to other persons to whom an oath is administered, would be a denial of equal protection. The only distinction is that one person has been tried for an unrelated crime and the others have not.

The Petitioner reads the holding of *Ashe, supra,* in an unwarranted broad sense. Heretofore, this Honorable Court has held that acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. See *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) and *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 235, 93 S.Ct. 489, 492, 34 L.Ed.2d 438 (1972).

Further, in *Dowling v. United States,* 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990), while addressing the issue of admissibility of other acts evidence pursuant to Federal Rule of Evidence 404(b), this Honorable Court stated:

> "[W]e decline to extend *Ashe v. Swenson* and the collateral estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." Id. 110 S.Ct. at 672.

This Court further stated:

> "[W]e find no merit in the Third Circuit's holding that the common-law doctrine of collateral estoppel in all circumstances bars the later use of evidence relating to prior conduct which the government failed to prove violated a criminal law."

Although in dicta, several cases, as noted by the Louisiana Supreme Court, have suggested that when the government produces new and additional evidence that a defendant lied under oath at his first trial sufficient to permit the trier of fact to conclude beyond a reasonable doubt that perjury has been committed, the doctrine of collateral estoppel does not bar a prosecution for perjury. *United States v. Nash*, 447 F.2d 1382 (4th Cir. 1971) (Winter, J. concurring); *Allen v. United States*, 194 F. 664 (4th Cir. 1912).

In essence, the aforementioned cases indicate that the holding of *Ashe v. Swenson* would not preclude a perjury prosecution against a person such as the Petitioner.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Louisiana Supreme Court has not set a dangerous precedent. It is clear that being confronted with a factual situation never heretofore directly addressed by itself or this Honorable Court, the Louisiana Supreme Court applied the rule of collateral estoppel with realism and rationality in order to prohibit a person such as the Petitioner, from making a mockery of our criminal justice system. The State of Louisiana respectfully requests that this Honorable Court deny this petition for certiorari.

Respectfully submitted,

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